IN THE HIGH COURT OF GUJARAT AT AHMEDABAD2

CRIMINAL APPEAL No. 726 of 1999

For Approval and Signature:

HONOURABLE MR.JUSTICE A.L.DAVE
HONOURABLE MR.JUSTICE BANKIM.N.MEHTA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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DHANSUKHBHAI GULAMBHAI CHAUDHARY - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
APPEAL THROUGH JAIL - MR BS SUPEHIA for the appellant.
MR HM PRACHCHHAK, APP, for the respondent-State.

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CORAM : HONOURABLE MR.JUSTICE A.L.DAVE
and
HONOURABLE MR.JUSTICE BANKIM.N.MEHTA

Date : 23/08/2006

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE A.L.DAVE)

1. The appellant is convicted for murder of his wife, Jeshmaben, by pouring kerosene over her and setting her to fire, on 18th April, 1997, at about 21.00 hours, in their residence, at Mota Falia of Village Kalamkui. The appellant had come to be tried by learned Additional Sessions Judge, Surat, Camping at Vyara, in Sessions case No.257 of 1997 and came to be convicted by a judgment and order dated 23rd June, 1999 and sentenced to undergo rigorous imprisonment for life and to pay a fine of Rs.400/-, in default thereof, to undergo further simple imprisonment for two months.

2. The prosecution case, in brief, is that the appellant and deceased-Jeshmaben were husband and wife. On the day of the incident, the appellant went home and inquired about a carpentry implement, which he had purchased in the recent past to the date of incident. The deceased had lent that implement to a neighbour, which resulted into a quarrel between the two and it was alleged that the appellant poured kerosene over the deceased and set her on fire. The deceased raised shouts but nobody from neighbourhood even came to her rescue. After some time, the

Sarpanch of the village, one neighbour and the mother of the deceased arrived. They claim that the deceased told them that the accused had poured kerosene over her and set her to fire. The Sarpanch claims to have informed Valod Police about the same. Next day in the morning, at about 6.15 A.M., the deceased was taken to hospital at Bardoli and Bardoli Police was informed, on the basis of which an entry was made in the Police Station Diary. The police arrived at the hospital, took First Information Report from the deceased and summoned the Executive Magistrate. The Executive Magistrate also arrived and recorded dying declaration of the deceased. The police registered the offence and, on investigation, having found sufficient material against the appellant, filed charge sheet in the Court of learned Judicial Magistrate, First Class, at Bardoli, who, in turn, committed the case to the Court of Sessions. Consequently, Sessions Case No.257 of 1997 came to be registered.

2.1 Charge was framed against the appellant-accused vide Exhibit 4. The accused pleased not guilty to the charge and came to be tried. Learned Additional Sessions Judge found that the

prosecution was successful in establishing the charge against the accused-appellant and, therefore, recorded conviction and sentence, as mentioned hereinabove.

3. We have heard learned Advocate, Mr. Supehia, for the appellant and learned Additional Public Prosecutor, Mr. Prachchhak, for the State and have gone through the record and proceedings.

4. Learned Advocate, Mr. Supehia, submitted that there are in all five dying declarations, three oral, one before the Executive Magistrate and one in the form of F. I. R. Mr. Supehia submitted that, two independent witnesses before whom the deceased was alleged to have made oral dying declaration, though they claimed that such declaration was made, have admitted in cross-examination that the deceased was not able to speak. Mr. Supehia submitted that the dying declaration by the Executive Magistrate was recorded without obtaining any opinion from the doctor and the same was the case in recording of the F. I. R. He submitted that the medical evidence indicates that the deceased

was administered intravenous pain killer and was drowsy and confused. In such a situation, she could not have given dying declaration before the Executive Magistrate so also the F. I. R., both of which were detailed. Mr. Supehia also submitted that before the Executive Magistrate was summoned, before the F. I. R. was recorded and before the dying declaration was recorded by the Executive Magistrate, a message was sent to police, on the basis of which an entry was made in the Station Diary. That Station Diary entry is at Exhibit 32. That entry was made at 7.00 A.M. on 19th April, 1997, which indicates that the deceased had poured kerosene herself and set herself to fire. The entry also indicates that the Executive Magistrate was summoned for recording dying declaration on the basis of this information. Mr. Supehia, therefore, submitted that the investigation and the prosecution evidence become doubtful and the benefit ought to have been given to the appellant by the Trial Court. He, therefore, submitted that the appeal may be allowed.

5. Learned Additional Public Prosecutor, Mr. Prachchhak, has opposed this appeal. According to him, certification by a

doctor before recording dying declaration is only a rule of prudence, as has been held by the Apex Court in various recent pronouncements and non-certification by doctor in presence of a specific assertion by the person recording the declaration that the deceased was well oriented and conscious would not be fatal to the prosecution case. The Trial Court was, therefore, justified in recording conviction. He submitted that the appeal may be dismissed.

6. We have gone through the record and proceedings. Panch Witnesses-Natwarbhai Keekmabhai Chaudhary (Exhibit 7) and Veljibhai Meecharabhai Chaudhary (Exhibit 8) have not supported the prosecution case.

6.1 Witness-Navinbhai Manchhibhai Chaudhary (Exhibit 9) is a witness to the Panchnama of the place of incident. He admits that his residence is at a distance of one kilometre from the place of incident and same is the case with Danasingbhai Mansingbhai Chaudhary, the other Panch. He says that Kalamkui has a population of about 2500 persons and there were many houses in

the vicinity of the place of incident.

6.2 Witness-Nathubhai Mohanbhai Chaudhary (Exhibit 11) says that he had gone to the house of the accused and the deceased on the day of the incident and found that the deceased had sustained burns. He said that he had informed the police about the same. He says that he took Jeshmaben to Sardar Smarak Hospital. He did not make any inquiry with the accused-appellant, but on asking, Jeshmaben told him that Dhansukh (the accused) had poured kerosene over her and set her to fire. He says that he did not inquire as to what was the cause for dispute. During cross-examination, he admits that he has not seen the incident. He informed Valod Police on that very day. He also admits that lips and tongue of the deceased were burnt. She was in a conscious state and was groaning because of pain.

6.3 Witness-Ramubhai Chhibabhai Chaudhary (Exhibit 12) says that he had gone with the Sarpanch to the place of incident on the day of incident and saw Jeshmaben in a burnt condition. Her parents were also present. He asked accused-Dhansukh as to how

did she sustain burns and Dhansukh told him to ask Jeshma herself and on asking, Jeshma told that Dhansukh had poured kerosene over her and set her to fire. Thereafter, they took Jeshma and Dhansukh in a tempo to hospital. Parents of deceased-Jeshma also accompanied them. During cross-examination, he admits that Jeshma had sustained severe burns and was unconscious. He also admits that he had not talked with Jeshma.

6.4 Valkiben Dalsingbhai is examined at Exhibit 21. She is the mother of the deceased and mother-in-law of the appellant. She says that when she reached the house of the deceased, the deceased was in a burnt condition. She did not ask anything to the accused. The deceased was conscious and, on being asked, she told that her husband had poured kerosene over her and set her to fire. She says that she did not ask the deceased as to why she was set to fire. She says that the accused always used to quarrel with the deceased frequently. The appellant was not doing any work and the deceased used to shoulder the burden of maintaining the family. She denies the suggestion about the deceased having not made any statement before her. In questions by the Court, she says that she

had accompanied the deceased to the hospital and she was with the deceased when doctor treated the deceased.

7. From these pieces of evidence, we find that, though witness-Nathubhai Mohanbhai Chaudhary and Ramubhai Chhibabhai Chadhary, initially, claimed that the deceased made an oral dying declaration implicating the accused, their cross-examination negatived their version in examination-in-chief because Nathubhai admitted that Jeshmaben was unconscious and was groaning with pain and her lips and tongue were burnt. Ramubhai admits that he had not talked with the deceased at all. He also admits that Jeshmaben was severely burnt and was unconscious. That leaves behind deposition of Valkiben, mother of the deceased. She asserts that the deceased gave an oral dying declaration implicating the appellant. But what is significant is her conduct. Although the deceased told her that the accused had poured kerosene over her and set her to fire, Valkiben does not ask as to why this has happened, which would be a natural conduct to expect from a mother. Likewise, the witness states that she had accompanied the deceased to the hospital and she was with the

deceased when the doctor was treating the deceased. Dr. Komal Jain appears to have sent a message to police at 7.00 A. M. on 19th April, 1997, on the basis of which Exhibit 32 entry was made in the Station Diary, which reveals that the deceased had committed suicide. If this witness was with the deceased, it is either this witness or the deceased who could have given the history to the doctor, on the basis of which the doctor sent the message to the police. It is also significant that Dr. Komal Jain has not been examined by the prosecution. In our opinion, therefore, no weightage can be given to the evidence of any of these witnesses, who claim that the deceased made an oral dying declaration before them implicating the accused.

8. Executive Magistrate, Bharatsinh Umedsinh Mahida, is examined at Exhibit 18. He says that on 19th April, 1997, he was on duty at Bardoli. He received Police Yadi for recording dying declaration and, therefore, he went to Sardar Smarak Hospital at about 11.25 and, on reaching the hospital, he made inquiry about Jeshmaben at the counter and then he went to the Ward and inquired from the nurse about Jeshmaben. The nurse showed him

the cot on which Jeshmaben was being treated. The witness says that he went to Jeshmaben and started asking questions and recorded whatever the answers were given by her. Jeshma told him that her husband, Dhansukh alias Chhimra had poured kerosene over her and set her to fire following altercation. She also told him that, at the time of the incident, she herself and her husband were present in the house. He produces the dying declaration at Exhibit 19. The witness says that when he recorded the dying declaration Jeshmaben was conscious and was able to understand the questions and was giving proper answers. He says that, if the patient failed to give proper answers, ordinarily, he would have obtained opinion of the doctor while recording the dying declaration. In the instant case, as the patient was giving proper answers, he had not obtained any opinion of the doctor. During cross-examination, he says that in the instant case, he went to the patient directly and recorded the dying declaration. He also admits that he had not contacted the doctor before recording the dying declaration. He admits during cross-examination that when he recorded the dying declaration of the deceased, the lady who was attending to the deceased was present. He denied the

suggestion that the deceased was not in a position to give statement.

8.1 P. S. I.-Dalsingbhai Govindbhai Chaudhary is examined at Exhibit 22. He says that, on receiving the complaint from Bardoli Police Station, the P. S. O. sent the complaint to him for investigation and he started investigation. He says that he sent message to superior officers through wireless and left Valod for Village Kalamkui. He had drawn Panchnama of the place of incident and took statements of witnesses.

8.2 Witness-Arun Jaganbhai is the Head Constable, who is examined at Exhibit 26, He says that, he was on duty at Sardar Smarak Hospital on 19.4.1997. On receiving order from the P.S.O., he recorded the F. I. R. of the deceased. She was in a burnt condition. She had sustained burns on forehead, trunk, hands, etc. When he recorded the F. I. R., Jeshmaben was able to speak and was conscious. He put questions to Jeshmaben, which she was able to understand and gave reply. The F. I. R. is at Exhibit 27, to be containing thumb impression of the deceased. He is cross-

examined. He says that when he took the F. I. R., nobody else was present. He says that he had not obtained any opinion of the doctor before recording the F. I. R. He says that he had learnt that accused-Dhansukh had also sustained burns. He did not record any statement of the accused.

8.3 Dr. Jayesh Takhatsinh Solanki is examined at Exhibit 13. He says that the deceased was brought to the hospital on 19th April, 1997 without Police Yadi. She had sustained 90 to 95% burns. She had sustained burns on both hands, legs, chest, stomach, neck and face. She was given intravenous injections of pain killer, tetanus and antibiotics. He says that dying declaration of the deceased was recorded by the Executive Magistrate with permission from Dr. Pathak. He says that he had also treated Dhansukhbhai, who gave a history that he sustained burns while trying to save his wife. During cross-examination, he admits that Jeshmaben did not give any case history. Jeshmaben was able to speak and understand. When the Executive Magistrate recorded the dying declaration, Dr. Pathak was present. He admits that, if a patient is not fully conscious, an endorsement to the effect that

patient being drowsy or confused would be made. He also admits that, if a patient is drowsy or confused, he would not be able to give proper reply. The medical certificate in respect of the deceased is produced at Exhibit 14 which, in terms, states that the deceased was drowsy and confused.

8.4 Dr. Ramiben Kasiyabhai Chaudhary is examined at Exhibit 16. She is the doctor who performed postmortem of the deceased. She has opined that the deceased died because of septicaemia. The deceased had 90% burns which was sufficient in ordinary course of nature to cause death. She admits that a person sustaining 90% burns would be in a state of coma and in such a situation would not be able to express anything. The postmortem notes are at Exhibit 17.

9. From the evidence of the Executive Magistrate, Head Constable-Arun Jaganbhai, Dr. Jayesh Solanki and Dr. Ramiben Chaudhary, it is clear that the deceased had sustained 90% burns and she could have been in a state of coma, which would render her disabled from expressing herself. Neither the Executive

Magistrate nor the Head Constable-Arun Jaganbhai, who recorded the F. I. R., contacted the doctor and obtained opinion about consciousness of the deceased and fit state of mind to give dying declaration or F. I. R. Both of them have said that, on talking to the deceased, they found that she was conscious and oriented. In this context, if medical evidence is seen, Dr. Ramilaben opined that a person with 90% burns could be in a state of coma. Dr. Jayesh Solanki said that the deceased was given intravenous pain killer injection. He has also stated that, if the patient is not fully conscious, that condition would be described as drowsy and confused and, if the patient is drowsy and confused, he would not be able to give proper reply. In the instant case, Exhibit 14-Medical Certificate of deceased-Jeshmaben indicates that her condition was drowsy and confused. Therefore, it is a matter of doubt whether the assessment made by the Executive Magistrate and Head Constable-Arun Jaganbhai about the fit state of mind of the deceased and consciousness was correct or not. This has also to be looked in juxtaposition with Exhibit 32, which is Station Diary entry made at 7.00 A. M., which reflects that the deceased sustained burns by pouring kerosene herself and setting herself

ablaze. Therefore, possibility of the deceased having not sustained homicidal burns cannot be ruled out. Apart from this, the possibility of the deceased being drowsy and confused and being not in a position to express herself correctly also cannot be ruled out. In this evidential state of the matter, in our opinion, it would be too risky to give full credence to the assessment made by the Executive Magistrate and the Head Constable regarding fit state of mind of the deceased. Dr. Jayesh Solanki says that permission of Dr. Pathak was obtained by the Executive Magistrate and that he was present when the dying declaration was recorded by the Executive Magistrate, whereas the Executive Magistrate gives a different version. He specifically says that he never tried to obtain opinion of the doctor. He did not even contact and doctor was not present when the dying declaration was recorded. The cumulative effect of these factors is that the dying declaration before the Executive Magistrate and the F. I. R. recorded by the Head Constable are rendered susceptible to doubt.

10. There cannot be any dispute that want of opinion by the doctor would not render the dying declaration unbelievable, if the

person recording the dying declaration has tested the ability of the declarant to give declaration. Such is the position in the instant case also, as emerging from the deposition of the Executive Magistrate as well as the Head Constable. But, in our opinion, it is unsafe to rely on their assessment in the instant case for the reason that they are not medical experts and the evidence of medical experts along with contemporaneous record indicates that the deceased was drowsy and confused. The F. I. R. and the dying declaration, therefore, may not reflect the correct history of the incident.

10.1 It is not emerging from the record as to who gave the history to the doctor, on the basis of which a message was sent to the Police about the suicidal burns. Dr. Komal Jain, who recorded the history has not been examined. But it emerges from deposition of Dr. Jayesh Solanki, during cross-examination, that Jeshmaben did not give any history. It also emerges from deposition of the Executive Magistrate that the lady, who was attending the deceased, was present when the dying declaration was made and evidence of Valkiben, mother of the deceased, indicates that she

went to the hospital along with the deceased and was with the deceased when the doctor gave treatment. The possibility, therefore, is that it is Valkiben, who gave the history to the doctor about suicidal burns, which would falsify her version in her examination-in-chief about oral dying declaration of homicidal burns being caused to the deceased by the appellant.

11. The prosecution case, therefore, cannot be said to be beyond the shadow of doubt. Whether the deceased met with suicidal burns or homicidal burns is a matter of doubt because two versions are coming from the evidence led by the prosecution. Likewise, there is no specific medical evidence about the mental state of the deceased when her F. I. R. and dying declaration were recorded. There is specific evidence that the deceased was drowsy and confused. There is evidence that she was administered sedatives and pain killer. There is positive evidence that a patient described as drowsy and confused would not be in a position to give proper replies. The assessment about mental state of the deceased made by the Head Constable and the Executive Magistrate is, therefore, risky to be accepted at face value. In our

opinion, the case against the appellant cannot be said to have been proved to the hilt and suffers from a number of defects, which would render the case doubtful and benefit of doubt should go to the accused-appellant. We are unable to agree with the reasoning adopted by the learned Trial Judge. The benefit of doubt has to be given to the accused and the judgment recording conviction cannot be confirmed. We, therefore, deem it proper to allow this appeal.

12. In the result, the appeal is allowed. The judgment and order of conviction and sentence of the Trial Court, impugned in the present appeal, is hereby set aside. The appellant is acquitted of the offences with which he is charged. The appellant is ordered to be set at liberty forthwith, if not required in any other case. Fine, if paid, shall be refunded to the appellant.

[A. L. DAVE, J.]

[BANKIM N. MEHTA, J.]

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